

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

SIERRA CLUB, a California nonprofit  
corporation; PUGET SOUNDKEEPER  
ALLIANCE, a Washington nonprofit  
corporation; RE SOURCES FOR  
SUSTAINABLE COMMUNITIES, a  
Washington nonprofit corporation;  
COLUMBIA RIVERKEEPER, a Washington  
nonprofit corporation; FRIENDS OF THE  
COLUMBIA GORGE, INC., dba FRIENDS  
OF THE COLUMBIA GORGE, an Oregon  
nonprofit corporation;

Plaintiffs,

v.

BNSF RAILWAY COMPANY, a Delaware  
corporation; CLOUD PEAK ENERGY, Inc., a  
Delaware corporation; PEABODY ENERGY  
CORPORATION; a Delaware corporation;  
GLOBAL MINING HOLDING CO., LLC, a  
Delaware limited liability company;  
FIRSTENERGY CORP., an Ohio corporation;  
AMBRE ENERGY NORTH AMERICA,  
INC., a Delaware corporation,

Defendants.

CIVIL No. \_\_\_\_\_

COMPLAINT

## INTRODUCTION

1. This is a civil suit for declaratory and injunctive relief against Defendants Burlington Northern Santa Fe Railway Company (“BNSF”), Peabody Energy, Inc., Global Mining Holding Co., LLC, Ambre Energy North America, Inc., Cloud Peak Energy, Inc., and FirstEnergy Corp. (“Coal Companies”) (BNSF and Coal Companies are hereafter collectively called “Dischargers”) for violations of the Federal Water Pollution Control Act (commonly known as the Clean Water Act and hereinafter referred to as the CWA), 33 U.S.C. §§1251 *et seq.*

2. This action is brought pursuant to Section 505 of the CWA (Citizen Suits), 33 U.S.C. §1365.

3. As detailed below, Plaintiffs allege that Dischargers have discharged coal, coal chunks, coal dust, metabolites or related byproducts of coal, and other substances or materials added to the coal including, but not limited to, surfactants and suppressants, and petroleum coke (“petcoke”) and its byproducts (collectively, hereinafter, “coal pollutants”) into waters of the United States into the Puget Sound and other waterbodies in and around the Seattle area as well as throughout the State of Washington.

4. These discharges have not been permitted under the CWA, so that each discharge violates §301(a) of the CWA, 33 U.S.C. §1311(a).

5. In addition, dischargers are likely to continue to violate the CWA by discharging, from a point source, coal pollutants into the waters of the United States.

6. Plaintiffs seek a declaratory judgment, injunctive relief, remedial relief, the imposition of civil penalties, and the award of costs, including attorney and expert witness fees.

## JURISDICTION

7. This Court has subject matter jurisdiction over the claims specified in this Complaint

pursuant to 33 U.S.C. §1365(a) and 28 U.S.C. §1331. The relief requested is authorized pursuant to 33 U.S.C. §§1319 and 1365(a), and 28 U.S.C. §§ 2201 and 2202.

8. In compliance with 33 U.S.C. §1365(b)(1)(A), on April 2, 2013, plaintiffs gave notice of the violations specified in this complaint and of their intent to file suit to the defendants, to the Administrator of the United States Environmental Protection Agency (EPA), to the Regional Administrator of the EPA, and to the State of Washington. A copy of the notice letter is attached hereto as Exhibit A and is incorporated by reference.

9. Sixty days have passed since the notice was served, and the violations complained of in the notice letter are continuing at this time, or are reasonably likely to continue. Defendants remain in violation of the CWA. Neither the EPA nor the Washington Department of Ecology (WADOE) has commenced or is diligently prosecuting a civil or criminal action to redress the violations.

### VENUE

10. Venue is appropriate pursuant to Section 505(c)(1) of the CWA, 33 U.S.C. §1365(c)(1), because the sources of the violations complained of have occurred in the District.

### PARTIES

#### Plaintiffs

11. Plaintiffs are five citizen organizations comprised, in part, of members who live, work, and recreate in the state of Washington. Plaintiffs share similar interests in the protection and preservation of regional water bodies and wild spaces.

#### Sierra Club

12. Plaintiff Sierra Club is a nonprofit corporation incorporated and headquartered in California, with a regional office located in Seattle. Sierra Club is dedicated to exploring,

1 enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible  
 2 use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and  
 3 restore the quality of the natural and human environment; and to using all lawful means to carry  
 4 out these objectives. Sierra Club's concerns encompass the protection and restoration of the  
 5 water quality of the waters of the U.S. within the state of Washington, including the Puget  
 6 Sound, the Columbia River, and all life connected to it, from their headwaters to the Pacific  
 7 Ocean. Sierra Club has more than 600,000 members nationwide, including over 21,000 in  
 8 Washington, and brings this action on behalf of itself and its affected members. Sierra Club  
 9 members reside, work, travel and recreate next to and in the general vicinity of BNSF's railroad  
 10 tracks in Washington and the waterways into which defendants discharge pollutants. The  
 11 environmental, health, aesthetic, and recreational interests of Sierra Club members have been,  
 12 are being, and will be adversely affected by defendants' illegal coal and petroleum coke pollutant  
 13 discharges into waters of the United States. Members of Sierra Club use and enjoy the waters  
 14 and lands into and onto which defendants' railcars discharge, including waters in the immediate  
 15 vicinity of, and downstream from, defendants' discharges into waters of the United States.

16 13. Sierra Club's members live within the impacted watersheds; recreate by fishing, rafting,  
 17 hiking, plant gathering, walking, windsurfing, sailing, photographing, and boating in and around  
 18 the impacted waters; observe and enjoy wildlife in the watershed around defendants' discharges;  
 19 and retain an aesthetic and health interest in the health and restoration of the impacted waters in  
 20 the vicinity of defendants' railroad tracks and railcars.

#### 21 Puget Soundkeeper

22 14. Puget Soundkeeper's mission is to protect and preserve the water of Puget Sound by  
 23 monitoring, cleaning up and preventing pollutants from entering its waters. Puget Soundkeeper  
 24

1 is headquartered in Washington with offices in Seattle. Puget Soundkeeper's approximately  
 2 1,400 members reside, among other places, throughout counties in Washington, particularly  
 3 around the Puget Sound, next to and in the general vicinity of BNSF's railroad tracks and the  
 4 waterways into which defendants discharge pollutants.

5 15. The environmental, health, aesthetic, and recreational interests of Puget Soundkeeper  
 6 members have been, are being, and will be adversely affected by defendants' illegal coal  
 7 pollutant discharges into waters of the United States. Members of Puget Soundkeeper use and  
 8 enjoy the waters and lands into and onto which defendants' railcars discharge, including waters  
 9 in the immediate vicinity of, and downstream from, defendants' discharges into waters of the  
 10 United States.

11 16. Puget Soundkeeper's members live within the impacted watersheds; recreate, or would  
 12 recreate, by fishing, rafting, hiking, plant gathering, walking, sailing, windsurfing, photographing  
 13 and boating in and around the impacted waters; observe and enjoy wildlife in the watershed  
 14 around defendants' discharges; and retain an aesthetic and health interest in the health and  
 15 restoration of the impacted waters in the vicinity of defendants' railroad tracks and railcars.

#### 16 RE Sources for Sustainable Communities

17 17. RE Sources for Sustainable Communities promotes sustainable communities through  
 18 recycling, education, advocacy, and conservation of natural resources. RE Sources is based in  
 19 Washington with offices in Bellingham. RE Sources for Sustainable Communities'  
 20 approximately 5,200 members reside, among other places, throughout counties in northwest  
 21 Washington next to and in the general vicinity of BNSF's railroad tracks and the waterways into  
 22 which defendants discharge pollutants.

23 18. The environmental, health, aesthetic, and recreational interests of RE Sources for  
 24

1 Sustainable Communities members have been, are being, and will be adversely affected by  
 2 defendants' illegal coal pollutant discharges into waters of the United States. Members of RE  
 3 Sources for Sustainable Communities use and enjoy the waters and lands into and onto which  
 4 defendants' railcars discharge, including waters in the immediate vicinity of, and downstream  
 5 from, defendants' discharges into waters of the United States.

6 19. RE Sources for Sustainable Communities' members live within the impacted  
 7 watersheds; recreate, or would recreate, by fishing, rafting, hiking, plant gathering, walking,  
 8 windsurfing, sailing, photographing and boating in and around the impacted waters; observe and  
 9 enjoy wildlife in the watershed around defendants' discharges; and retain an aesthetic and health  
 10 interest in the health and restoration of the impacted waters in the vicinity of defendants' railroad  
 11 tracks and railcars.

#### 12 Columbia Riverkeeper

13 20. Columbia Riverkeeper's mission is to restore and protect the water quality of the  
 14 Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. To achieve  
 15 these objectives, Riverkeeper operates scientific, educational, and legal programs aimed at  
 16 protecting water, quality, air quality, and habitat in the Columbia River Basin. Columbia  
 17 Riverkeeper's over 3000 members reside, among other places, throughout counties in  
 18 Washington next to and in the general vicinity of BNSF's railroad tracks and the waterways into  
 19 which defendants discharge pollutants.

20 21. The environmental, health, aesthetic, and recreational interests of Columbia  
 21 Riverkeeper's members have been, are being, and will be adversely affected by defendants'  
 22 illegal coal pollutant discharges into waters of the United States. Members of Columbia  
 23 Riverkeeper use and enjoy the waters and lands into and onto which defendants' railcars

1 discharge, including waters in the immediate vicinity of, and downstream from, defendants'  
 2 discharges into waters of the United States.

3 22. Columbia Riverkeeper's members live within the impacted watersheds; recreate, or would  
 4 recreate, by fishing, rafting, hiking, plant gathering, walking, windsurfing, photographing and  
 5 boating in and around the impacted waters; observe and enjoy wildlife in the watershed around  
 6 defendants' discharges; and retain an aesthetic and health interest in the health and restoration of  
 7 the impacted waters in the vicinity of defendants' railroad tracks and railcars.

8 Friends of the Columbia Gorge

9 23. Friends of the Columbia Gorge seeks to vigorously protect the scenic, natural, cultural,  
 10 and recreational resources of the Columbia River Gorge. Friends of the Columbia Gorge's  
 11 approximately 5,000 members reside, among other places, throughout counties in Washington  
 12 next to and in the general vicinity of BNSF's railroad tracks and the waterways into which  
 13 defendants discharge pollutants.

14 24. The environmental, health, aesthetic, and recreational interests of Friends of the  
 15 Columbia Gorge members have been, are being, and will be adversely affected by defendants'  
 16 illegal coal pollutant discharges into waters of the United States. Members of Friends of the  
 17 Columbia Gorge use and enjoy the waters and lands into and onto which defendants' railcars  
 18 discharge, including waters in the immediate vicinity of, and downstream from, defendants'  
 19 discharges into waters of the United States.

20 25. Friends of the Columbia Gorge's members live within the impacted watersheds; recreate,  
 21 or would recreate, by fishing, rafting, hiking, plant gathering, walking, windsurfing,  
 22 photographing and boating in and around the impacted waters; observe and enjoy wildlife in the  
 23 watershed around defendants' discharges; and retain an aesthetic and health interest in the health  
 24

1 and restoration of the impacted waters in the vicinity of defendants' railroad tracks and railcars.

2 Defendants

3 Burlington Northern Santa Fe Railway Company ("BNSF")

4 26. BNSF Railway has a rail network of 32,500 route miles in 28 states and two Canadian  
5 provinces. BNSF owns and operates rail lines throughout the state of Washington and along the  
6 Columbia River along the Washington/Oregon border. In 2012, BNSF hauled 2.2 million coal  
7 shipments. In 2012, BNSF reported that its coal business unit was responsible for nearly one-  
8 quarter--\$4.8 billion--of the company's \$20 billion total freight revenue, and that more than 90%  
9 of the coal hauled by BNSF comes from the Powder River Basin.

10 27. BNSF transports coal from, *inter alia*, the Powder River Basin across waterways via  
11 routes in the center and south of Washington to locations throughout Washington and sometimes  
12 continuing into Canada. The coal transport trains travel along, among other waterways, the  
13 Puget Sound and the Columbia River.

14 Peabody Energy

15 28. Peabody Energy Corp. ("Peabody") is the world's largest private-sector coal company  
16 and has approximately 9 billion tons of proven coal reserves. It owns, through subsidiaries,  
17 majority interests in 28 coal operations located throughout the United States and Australia,  
18 including coal operations in the Powder River Basin.

19 29. Peabody Energy Corp. is the owner and ultimate parent company of Peabody Caballo  
20 Mining, LLC, which operates the Rawhide mine. The Rawhide mine has supplied coal to the  
21 TransAlta coal-fired power plant from 2008 through the present.

22 30. Peabody, at a minimum, operates, directs and controls the loading of coal from the  
23 Rawhide mine into the rail cars, which constitute containers and/or rolling stock. Peabody has  
24



the ability to determine how coal in the rail cars is transported by BNSF.

31. Peabody ships and intends to continue to ship coal to Washington.

Ambre Energy North America, Inc.

32. Ambre Energy North America, Inc., is a wholly owned subsidiary of Ambre Energy, an Australian coal and oil shale company.

33. Ambre Energy owns 50% of the Black Butte Coal Mine and the Leucite Hill Mine, which supplies coal to the TransAlta power plant.

34. Ambre Energy is the owner/operator of some of the rail cars, which constitute point source containers and/or rolling stock. Ambre Energy, at a minimum, operates, directs and controls the loading of coal into the rail cars. Ambre Energy has the ability to determine how coal in the rail cars is transported by BNSF.

35. Ambre Energy has also secured port facilities and sites for potential coal export infrastructure in the Pacific Northwest. Ambre Energy owns a 62% share of the Millenium Bulk Terminal in Longview, WA, and 100% share of the Coyote Island Terminal project in Morrow, OR. Ambre Energy intends to continue coal shipments to and through Washington by rail now and in the future.

Cloud Peak Energy

36. Cloud Peak Energy is one of the largest coal producers in the United States. Cloud Peak owns and operates three surface coal mines in the Powder River Basin, one of the nation's major coal producing regions. Cloud Peak Energy Inc. owns Cloud Peak Energy Resources, which owns Spring Creek Coal LLC, the operator of the Spring Creek Coal mine. Spring Creek has supplied TransAlta with coal from 2008-present. Cloud Peak also ships over 4 million tons of coal per year from its Spring Creek Mine to the Westshore Terminal at Robert's Bank in

Vancouver, Canada via Washington state for export.

37. Cloud Peak Energy is the owner/operator of some of the rail cars, which constitute point source containers and/or rolling stock. Cloud Peak Energy, at a minimum, operates, directs and controls the loading of the rail cars. Cloud Peak has the ability to determine how coal in the rail cars is transported by BNSF. Cloud Peak intends to continue coal shipments to and through Washington by rail now and in the future.

Global Mining Holding Co., LLC

38. Global Mining Holding Co., LLC owns a 2/3 share in Signal Peak Energy LLC which operates the Signal Peak coal mine near Roundup, Montana. Signal Peak (also known as the Bull Mountain mine) is one of the highest-producing underground mines in the United States.

39. Coal from Signal Peak is shipped to Europe, Latin America, and Asia on BNSF rail lines through Washington state to the Westshore Terminal at Robert's Bank in Vancouver, Canada.

40. Global Mining Holding is the owner/operator of some rail cars, which constitute point source containers and/or rolling stock. Global Mining Holding operates, directs and controls the loading of the rail cars. Global Mining has the ability to determine how coal in the rail cars is transported by BNSF. Global Mining Holding intends to continue coal shipments through Washington by rail now and in the future.

FirstEnergy

41. FirstEnergy Corp. is an energy company that operates in six states and holds \$50 billion in assets. FirstEnergy's subsidiaries maintain a total capacity of over 20,000 megawatts. In 2012, approximately 64% of FirstEnergy's fuel mix came from coal.

42. FirstEnergy holds a 1/3 ownership interest in Signal Peak coal mine (also known as the Bull Mountain mine) near Roundup, Montana, a facility that ships coal through Washington to

1 export. Coal is shipped on BNSF rail lines through Washington state to the Westshore Terminal  
2 at Robert's Bank in Vancouver, Canada.

3 43. FirstEnergy is the owner/operator of some rail cars, which constitute point source  
4 containers and/or rolling stock. FirstEnergy operates, directs and controls the loading of the rail  
5 cars and has the ability to determine how coal in the rail cars is transported by BNSF.  
6 FirstEnergy intends to continue coal shipments through Washington by rail now and in the  
7 future.

### 8 **STATUTORY AND REGULATORY FRAMEWORK**

9 44. Under the CWA, the United States has committed itself "to restore and maintain the  
10 chemical, physical, and biological integrity of the Nation's waters," including establishing a  
11 "national goal that the discharge of pollutants into the navigable waters be eliminated." CWA §  
12 101, 33 U.S.C. §1251.

13 45. Pursuant to the CWA, a discharge of a pollutant means "any addition of any pollutant to  
14 navigable waters from any point source," and "any addition of any pollutant to the waters of the  
15 contiguous zone or the ocean from any point source other than a vessel or other floating craft."  
16 CWA § 502(12), 33 U.S.C. § 1362(12). *See also* CWA § 502(7), 33 U.S.C. § 1362(7) (definition  
17 of "navigable waters"); 40 CFR § 122.2 (definition of "waters of the U.S.").

18 46. The CWA specifies a number of materials and wastes that, if discharged into water,  
19 render them pollutants, including, but not limited to, solid waste, chemical wastes, industrial  
20 waste, biological materials, sand, and rock. CWA § 502(6), 33 U.S.C. § 1362(6).

21 47. Under the Clean Water Act, the term "point source" means "any discernible, confined and  
22 discrete conveyance, including but not limited to any . . . container [or] rolling stock. . .from  
23 which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

49. To advance its goals, Congress established in the CWA that all discharges of pollutants are prohibited "except in compliance" with specified provisions of the CWA including, most importantly, the National Pollutant Discharge Elimination System (NPDES) permitting program. CWA § 301(a), 33 U.S.C. §1311(a); CWA § 402(a), 33 U.S.C. §1342(a); 40 CFR §§122.1 *et seq.*

50. The NPDES program requires a potential discharger to first obtain a NPDES permit that limits the type and quantity of pollutants to be released so as to maintain water quality standards, among other objectives. CWA § 402(a), 33 U.S.C. §1342(a); 40 CFR §122.1. No NPDES permit may be issued where discharges pursuant to it would cause receiving water-bodies to fail to meet water quality standards. *Id.* and 40 CFR §122.4 (prohibitions on permit issuance). Unless done pursuant to a NPDES permit, any coal pollutant discharge from a rail car or train into navigable waters of the U.S. is prohibited under the CWA.

## FACTS

### Pollutants Being Discharged

51. Defendants, by their ownership, operation, lease of, participation in, contract for, or receipt of material from, trains and rail cars transporting coal, petcoke, and their byproducts (hereinafter, "coal"), have discharged, are discharging, and will continue to discharge coal pollutants to waters of the U.S. within the State of Washington.

52. Such coal pollutants include, but are not limited to, coal, coal chunks, coal dust, coal contaminated water, metabolites or related by-products of coal, surfactants applied to the coal, coal chunks and coal dust, petcoke, petcoke chunks, petcoke dust, petcoke contaminated water, and suppressants.

### Discharge Events

53. Defendants have discharged, are discharging, and will continue to discharge coal

pollutants into waters of the U.S. by each and every one of the defendants' trains and rail cars that carry coal.

54. Each and every train and each and every rail car discharges coal pollutants to waters of the United States when traveling adjacent to, over, and in proximity to waters of the United States.

55. Defendants discharge coal pollutants into waters of the U.S. in the State of Washington through holes in the bottoms and sides of the rail cars and by spillage or ejection from the open tops of the rail cars and trains.

56. Defendants discharge coal pollutants during the transportation of the coal in both normal and abnormal operating conditions, and upon loading and unloading coal.

57. Defendants' discharges of coal pollutants from the container or rolling stock point sources are especially frequent or severe when their coal trains pass over rough rail tracks, track changes, bridges, and switches; during transportation of coal over bumpy terrain, in windy conditions, at high operating speed, during steep descents and ascents and through sag-areas spanning steep ascent and descent reaches of track (or vice versa); during and after precipitation events; at moments of high crosswinds; and during derailments.

58. Defendants' coal pollutant discharges occur despite the use of topping agents, surfactants or suppressants, and these topping agents, surfactants and suppressants themselves are pollutants discharged by defendants.

59. The specific dates, times, amounts, and exact or approximate locations, along with, for example, the rail conditions, rail car conditions, design and performance of rail cars, weather conditions, passing trains, loading and unloading practices employed, and incline or decline of railways in specific locations of the discharges during each of the years 2008 through the present

are, or should be, in the possession of the defendants.

### Waters Affected

60. Waters of the U.S. are located in, in proximity to, or run through the State of Washington and receive defendants' coal pollutant discharges where defendant BSNF-operated rail lines and rail cars pass by, cross, or are in proximity to such waters.

61. Defendants have discharged, are discharging, and will continue to discharge pollutants from point sources into waters of the United States, including, but not limited to, rivers, streams, lakes, ponds, coulees, estuaries, bays, sounds, canals, shipping canals, fresh water and tidal wetlands, and coastal waters of the Pacific Ocean. These waters derive water from, are tributaries to, forks of, and/or exchange water with many of the waters in the State of Washington, many of which are navigable waters and all of which eventually discharge into the Pacific Ocean.

62. Waters impacted by defendants' coal pollutant discharges include, but are not limited to, the Puget Sound, Columbia River, Alder Creek, Ashes Lake, Bass Lake, Beckie River, Beckler River, Chamberlain Lake, Chiwawa River, Chuckanut Bay, Coal Creek, Cow Creek, Cowlitz River, Coweeman Confluence, Crab Creek, Crah Creek, Dakota Creek, Dead Canyon, Deschutes River, Drano Lake, East Low Canal, Elliott Bay, Esquatzel Coulee, Franz Lake, Glade Creek, Green River, Grant Lake, Hangman Creek (also known as Latah Creek), Hewett Lake, Horsethief Lake, Howard Hanson Reservoir, Kalama River, Klickitat River, Lake Union, Lewis River, Little White Salmon River, Little Spearfish Lake, Look Lake, Locke Lake, Newaukum River, Nisqually River, Nooksack River, North Fork – Skykomish River, Pilchuk Creek, Pilchuk River, Possession Sound, Quilceda Creek, Rock Cove, Rowland Lake, Salmon Creek, Samish River, Shilshole Bay, Skagit River, Skookumchuck River, Skykomish River, Snake River,

1 Snohomish River, South Fork – Skykomish River, Spokane River, Status Creek, Steamboat  
 2 Slough, Stillaguamish River, Stuck River, Sultan River, Teanaway River, Toppenish Creek,  
 3 Toutle River, Union Slough, Wallace River, Washougal River, Wenatchee River, West Canal,  
 4 White Salmon River, Wind River, Yakima River and their tributaries.<sup>1</sup>

5 Discharges Unpermitted Under the CWA

6 63. Defendants have never obtained a NPDES permit allowing their discharges of coal  
 7 pollutants into State of Washington waterbodies from rail cars and trains. Moreover, the types of  
 8 discharges that have occurred, are occurring and that are likely to continue to occur are not  
 9 permitted under federal law.

10 64. Defendants intend to continue loading and transporting coal and petcoke and related coal  
 11 pollutants by rail to and through the state of Washington.

12 **ALLEGATIONS**

13 65. Plaintiffs hereby incorporate by reference all preceding paragraphs.

14 66. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants  
 15 from a point source into navigable waters of the United States, unless pursuant to the terms of a  
 16 NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. §1342.

17 67. Defendants have discharged coal pollutants in contravention of CWA §301, as described  
 18 herein, during rail transport of coal, since at least April 2008, and such discharges are presently  
 19 ongoing and likely to continue.

20  
 21  
 22 <sup>1</sup> Plaintiffs note that this list is inclusive of some waterways in the Western District of  
 23 Washington, some in the Eastern District of Washington, and some which flow through both the  
 24 Western and Eastern Districts of Washington. Plaintiffs intend to file a similar action in the  
 Eastern District of Washington at a later date, but, recognizing that some of the waterways  
 overlap Districts, include one list of impacted waterways here for reference.

**COUNT 1**

**Discharge of Pollutants Without NPDES Permit into Waters of United States**

68. All waterways named herein are waters of the United States protected by the CWA.

69. Defendants did not have and do not retain a NPDES Permit authorizing their discharges of coal pollutants into such waterways.

70. Defendants have discharged coal pollutants from the operation of rail cars and trains into, at least, the listed waterways from April 2008 (and for many years prior to 2008) to present.

Such operations and discharges are continuing and are likely to continue into the future.

71. Each such coal discharge from each rail car and train into each separate waterway on each separate day constitutes a separate violation of the CWA.

**RELIEF REQUESTED**

WHEREFORE, plaintiffs respectfully request that this Court grant plaintiffs the following relief:

A. Issue a declaratory judgment that defendants have violated and continue to violate the CWA;

B. Issue a declaratory judgment that each rail car container constitutes a separate point source;

C. Issue a declaratory judgment that each separate discharge into each waterway constitutes a separate violation;

C. Enjoin defendants from operating rail cars and trains in such a manner as will result in further violation of the CWA;

D. Enjoin defendants' use of uncovered rail cars for any transport of coal;

E. Enjoin defendants' use of rail cars that, through design or imperfection – including holes or openings in their sides or bottoms—allow coal pollutants to be discharged into waters



1 of the U.S.;

2 F. Order defendants to remove coal pollutants that are in-place or otherwise recoverable  
3 from receiving water-bodies;

4 G. Order defendants to pay civil penalties of up to \$37,500 per day for each violation of the  
5 CWA, pursuant to Sections 309(d) and 505(a) of the CWA, 33 U.S.C. §§1319(d) and  
6 1365(a), and 40 C.F.R. § 19 *et seq.*, including those identified in plaintiff's notice letters,  
7 violations identified during discovery, and violations committed subsequent to those  
8 identified in this Complaint;

9 H. Order defendants to monitor and report their coal pollutant discharges to the federal  
10 Environmental Protection Agency and the State of Washington Department of Ecology;

11 I. Order defendants to provide plaintiff, for a period beginning on the date of the Court's  
12 order and running for five years after defendants achieve compliance with the CWA with  
13 a copy of all reports and other documents which defendants submit to EPA, to the  
14 Regional Administrator of the EPA, or to the State of Washington regarding defendants'  
15 coal pollutant discharges at the time these documents are submitted to these authorities;

16 J. Issue a remedial injunction ordering defendants to pay the cost of any environmental  
17 restoration or remediation deemed necessary and proper by the Court to comply with the  
18 Clean Water Act and ameliorate the water degradation caused by defendants' violations;

19 K. Award plaintiff its costs, including reasonable attorney and expert witness fees, as  
20 authorized by 33 U.S.C. §1365(d) and 28 U.S.C. §2412(d); and

21 L. Award such other relief as this Court deems appropriate.  
22  
23  
24

1 Respectfully submitted,

2 s/ Charles M. Tebbutt  
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4 pending)  
5 DANIEL M. GALPERN (*pro hac vice*  
6 pending)  
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